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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

AUG 10 2000

File: [redacted] Office: Texas Service Center Date:

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER:

[redacted]

Public Copy

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a medical practice which seeks to employ the beneficiary permanently in the United States as a medical record administrator. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of February 21, 1995, the filing date of the visa petition.

On appeal, counsel for the petitioner provides a brief and additional documentation.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's filing date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is February 21, 1995. The beneficiary's salary as stated on the labor certification is $34,989 annually.

Counsel for the petitioner initially submitted a copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for the period March 8, 1995 through December 31, 1995 and copies of the petitioner's personal bank statements for the period February 29, 1995 through March 31, 1995. The federal tax return showed that the business was incorporated on March 8, 1995. The federal tax return also reflected gross receipts of $395,002; gross profit of $395,002; compensation of officers of $278,471; salaries and wages of $29,486; depreciation of $5,341; and taxable income before net operating loss deduction and special deductions of $0. Schedule L reflected total current assets of $43,836 (lines 1-6) of which $42,515 was in cash and total current liabilities of $34,366 (lines 16-18).

The director concluded that the documents submitted did not establish that the petitioner had the ability to pay the proffered wage as of the filing date of the petition and denied the petition accordingly.

On appeal, counsel provides a brief, another copy of the previously submitted 1995 federal income tax return, a copy of the petitioner's personal bank statements for the period February 28, 1995 through April 28, 1995, bank statements for the business for the period March 1, 1996 through May 31, 1996, a letter from the petitioner's accountant, and a copy of the petitioner's 1995 and 1996 Form 1040 U.S. Individual Income Tax Return.

The accountant states:

> It was stated that the tax return for 1995 showed $0 taxable income; however, we have submitted a copy of the 1995 Form 1040 which reflects $435,013 in total income and a copy of the 1996 Form 1040 which reflects $404,916 in total income. It appears that the tax return that showed $0 taxable income was the 1995 1120 which is for [redacted] for which Dr. [redacted] is the sole shareholder. It should be noted that even though the corporation was reflecting a taxable income of $0, Dr. [redacted] was paid $278,471 in officer salaries. This amount is clearly more than the proffered salary of $34,989 per annum which is able to be readily met.

Counsel states:

> In support of the visa petition (Form I-140), the petitioner submitted the 1995 federal corporation income tax return (form 1120) in connection with his medical practice. [redacted] (hereinafter

referred as [redacted] wherein the petitioner (the sole director and stockholder of this professional association) generated gross revenues in the amount of $395,002. [redacted] paid total compensation in the amount of $278,471 to the officer and wages and salaries in the amount of $29,486. . . .

. . . It is interesting to note that the Center Director denied the said visa petition, after a period of nearly seven (7) months, without affording the petitioner the customary opportunity to rebut its contention and thereby demonstrate its financial ability to pay the proffered wage. Clearly this is a drastic departure from the established Service practice whereby a petitioner is provided the opportunity to address and/or rebut a potential adverse determination.

. . . The fact that the petitioner's corporation, [redacted] demonstrated taxable income of $0 should not be regarded in a negative light because the same is a result of routine business deductions for accounting purposes and is consistent with generally accepted rules of accounting.

It bears emphasis that the tax return which reflected $0 taxable income was for [redacted] which is a professional association or corporation wherein Dr [redacted] is the sole officer, director and shareholder. Although the corporation demonstrated taxable income of $0 the fact remains that Dr. [redacted] was paid $278,471 in officer's compensation or salary. This amount is clearly sufficient to pay the proffered salary in the sum of $34,989 per annum. It is noteworthy that a net operating loss was not shown.

In addition, Dr. [redacted] heretofore submitted statements for bank accounts covering the months ending February 28, 1995 and March 31, 1995 which reflected that the petitioner maintained monthly balances in the amount of $17,801.01 and $54,265.24 respectively. . . .

As evidence of his continuing financial growth and success, Dr [redacted] is now submitting more recent bank statements. For example, the statement for the month of March 1996 reflects a balance in the amount of $27,098.01 (credits of $51,954.35), the statement for April 1996 reflects a balance of $27,748.30 (credits of $40,831.83), and the statement for May 1996 reflects a balance of

> $28,701.64 (credits of $80,565.68). . . . Further, the petitioner's wages and salaries have risen from $278,471 in 1995 to $467,248 in 1999 - an increase of $188,777. These are undoubtedly impressive figures which evidence the petitioner's continuing growth and earning capacity.
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> . . . It is patently clear from the foregoing that Dr. [redacted] medical practice is in fact a growing concern and expects to realize a substantial increase in profits in the years to come. See *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Com. 1967) and *Matter of* --, (AAU. 11 Immig. Rpt. B2-72, Dec. 18, 1992) where the Associate Commissioner approved the petition since the petitioner had reasonable expectations of increased business and profit which established his ability to pay the wage as of the priority date.

A corporation is a separate and distinct legal entity from its owners or stockholders. Consequently, any assets of its stockholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See Matter of M, 8 I&N Dec. 24 (BIA 1958; AG 1958); Matter of Aphrodite Investments Limited, 17 I&N Dec. 530 (Comm. 1980); and Matter of Tessel, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

Even though the petitioner submitted a portion of its 1996 commercial bank statements as evidence that it had sufficient cash flow to pay the wage, there is no evidence that the bank statements somehow reflect additional available funds that were not reflected on the tax return. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

Matter of Sonegawa, 12 I&N Dec. 612 (Reg. Comm. 1967) relates to petitions filed during uncharacteristically unprofitable or difficult years but only within a framework of profitable or successful years. The petitioning entity in Sonegawa had been in business for over 11 years and routinely earned a gross annual income of about $100,000.00. During the year in which the petition was filed in that case, the petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured

in Time and Look magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in Sonegawa was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case which parallel those in Sonegawa, nor has it been established that 1995 was an uncharacteristically unprofitable year for the petitioner.

A review of the federal tax return for the period March 8, 1995 through December 31, 1995 shows that when one adds the taxable income, the depreciation, and the cash on hand at year end (to the extent that total current assets exceed total current liabilities), the total equals $14,811, $20,178 less than the proffered wage.

Accordingly, after a review of the federal tax return and additional documentation furnished, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered at the time of filing of the petition.

The burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.